S. C. U. S.
FILED
OCT 3 1975

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-342

Federal Power Commission, *Petitioner*

v.

Conway Corporation, *Et al., Respondents*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Brief for Conway Corporation, Et Al., In Opposition

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October, 1975

BEACON PRINTING · 293-7160 · Washington, D.C. 20036

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OPINION BELOW

The opinion of the Court of Appeals (App. A, To Petition) is reported at 510 F.2d 1264. The orders of the Federal Power Commission from which review was sought (App. C, D and E, To the Petition) are reported at 50 FPC 289, 1293 and 1780.

JURISDICTION

The judgment of the Court of Appeals was entered on April 4, 1975. On the Commission's application, the Chief Justice has twice extended the time for filing a Petition for Writ of Certiorari, the second order extending the Commission's time "to and including September 1, 1975." The Commission

has invoked the jurisdiction of this Court under 28 U.S.C. 1254 (1) and Section 313(b) of the Federal Power Act, 16 U.S.C. 825*l*(b). A Petition for a Writ of Certiorari was filed on September 2, 1975, one day beyond the last day provided for in the order of the Chief Justice.[1]

QUESTION PRESENTED[2]

Whether the court of appeals below correctly determined that the Federal Power Commission erred in its determination that it lacked the power, in ruling on a proposed rate increase to wholesale customers[3] with which the filing utility competed directly at retail, to remedy the anti-competitive impact created by the alleged intentional "price-squeeze" imposed when the utility raised its wholesale rates substantially above those which it charged at retail without making a retail filing.

STATEMENT

The Customers regard the statement set forth by the Commission in its Section 1 as providing an adequate description of the proceedings before the Commission for the purpose of determining whether to grant Certiorari. The Commission's statement of the holding of the court below in Part II of its statement, however, appears to be in error both in its mischaracterization of the words of the statute (see below) and in its

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[1]The Customers here have repeatedly urged expedition in the Commission's determination to apply or not to apply for Certiorari, since the FPC has, in the underlying rate case, and in other such cases, consistently refused to allow even discovery on the issue of the intentional price squeeze asserted below, pending determination of this Court.

[2]The Customers also note that the Petition appears to be out of time.

[3]The wholesale customers of Arkansas Power & Light Company include Conway Corporation, Conway, Arkansas, Benton Municipal Light and Water Works, Hope Water & Light Commission, City of North Little Rock, City of West Memphis, Farmers Electric Cooperative Corporation and Mississippi County Electric Cooperative, Inc., Arkansas.

assertion that "the court recognized that the Commission could not approve a wholesale rate which failed to recover properly allocated wholesale costs." (Petition, p.5) The court below expressly found it unnecessary to reach the latter issue as may be noted at p.22A, the portion cited, of the Opinion as reprinted in the Appendix to the Petition.

ARGUMENT

1. It is clear and all parties appear to have agreed that in a non-regulated industry, a price-squeeze, such as that here alleged, by a vertically integrated supplier against a wholesale customer would be illegal, and, if proven, not only damages, but treble damages under the anti-trust laws would be recoverable. *United States* v. *Aluminum Co. of America*, 148 F2d 416(CA2, 1945). It also appears clear that if there were no regulatory body superimposed, no common law public utility employing the power of eminent domain to furnish its services could employ price discrimination between two similar types of service and the Customers discriminated against could recover at least simple damages. See *Western Union Telegraph Co.* v. *Call Publishing Co.*, 181 U.S.92, 99-100(1901); *Postal Cable Telegraph Co.* v. *Cumberland Telephone and Telegraph Co.*, 177 Fed. 726(MD Tenn, 1910); *North Carolina Public Service Co.* v. *Southern Power Co.*, 282 Fed. 837(CA4, 1922); *Salisbury and Spencer Railway Co.* v. *SouthernPower Co.*, 101 S.E.593 (1919), 102 S.E.625(1920), 105 S.E.28(S.Ct.N.C. 1920). This Court's decision in *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246 (1951), however, adopting the position urged by the Federal Power Commission in that case, appears to hold that the FPC has primary jurisdiction to deal with questions of this nature under the Federal Power Act. If the FPC does not have jurisdiction to remedy such a "price squeeze," then it is not clear where such a remedy would lie.

The view of the court below that the FPC had jurisdiction to deal with the price-squeeze here alleged is directly consistent with the decision of this Court in *Gulf States Utilities Co.* v. *FPC*, 411 U.S.747 (1973). As this Court noted, at 758-759:

"The Act had two primary and related purposes: to curb abusive practices of public utility companies by bringing them under effective control, and to provide effective federal regulation of the expanding business of transmitting and selling electric power in interstate commerce . . . The Act was passed in the context of, and in response to, great concentrations of economic and even political power vested in power trusts, and the absence of antitrust enforcement to restrain the growth and practices of public utility holding companies . . . .

In order to achieve federal regulation of these and other perceived problems on the operational level of the interstate public utility business, Tit. II was enacted . . . . Title II certainly did not preclude the operation of the antitrust laws, and it vested the Federal Power Commission with important and broad regulatory power in the areas described above. See *Otter Tail Power Co.* v. *United States*, 410 U.S. 366(1973); Meeks, Concentration in the Electric Power Industry: The Impact of Anti-trust Policy, 72 Col. L. Rev. 64(1972). *This power clearly carries with it the responsibility to consider, in appropriate circumstances, the anti-competitive effects of regulated aspects of interstate utility operations pursuant to . . . like directives contained in §§205,206.* . . . The Act did not render antitrust policy irrelevant to the Commission's regulation of the electric power industry. [emphasis added].

Moreover, the language of this Court in this respect in *Gulf States*, *supra*, is entirely consistent with the representations in this regard made by the Commission in its brief to this Court in that Docket. For example, at p. 7 of that brief, the Commission represented that "in exercising its control over . . . rates, practices, and services of public utilities, the Commission has full authority to consider anti-trust allegations and to prevent or remedy anti-trust violations related to such matters." Indeed, at pp. 13-14 of its brief in *Gulf States*, the Commission stated:

"Allegations of anticompetitive conduct would be properly raised and fully considered by the Commission in proceedings . . . to review rates under Sections 205 and 206, . . . to review charges of unduly discriminatory rates or practices under Section 205. . . . Under each of these Sections the Commission has jurisdiction to compel certain action by a public utility. If anticompetitive conduct or effects were established in such proceedings and were not outweighed by other factors which determine the public interest, the Commission could order a remedy *directly related* to the facts proven, *e.g.*, . . . order a change in rates, etc."

See also Commission brief in *Gulf States* at pp. 12, 13, 15, and 19.

2. In light of the basic law, and the Opinion below, however, the Commission begins its Petition with the proposition that its institutional act, the Federal Power Act, at Section 205(b), 16 U.S.C. 824d(b) "prohibits discrimination between '*sales* subject to the jurisdiction of the Commission'" (Petition, p. 6) [emphasis added]. It then argues (Petition, pp. 6-7) that since the Commission may act to set only jurisdictional rates, the Court below was in error when it suggested that, if the Commission were correct, Congress could easily have provided that the FPC could prohibit the maintenance of unreasonable differences in rate only "between classes of service subject to the jurisdiction of the Commission," since "this language would be mere surplusage." Aside from the somewhat strained nature of the argument, its basic difficulty lies in the fact that the Commission has misquoted its own basic statute, and then relied upon the misquotation.

The statute (Section 205(b)) is set forth in pertinent part immediately below the Commission's misquotation on p. 6 of its Petition. Obviously, it would be a great deal more difficult to bend the language of the statute to the Commission's position if the Commission had not added a gratuitous, but very important, *s* to the word "sale" in the purported quote. See also the material appearing within quotation marks at p. 5, line 5 of the Petition. The statute, however, as correctly set forth by the Court of Appeals, below, at e.g., Appendix to the Petition at pp. 12, 13, etc. provides only that "no public utility shall, with respect to *any* transmission or *sale* subject to the jurisdiction of the Commission . . . maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service." [emphasis

supplied]. Thus, the statute, as noted by the court of appeals, provides only that the Commission may act on rates jurisdictional with it, but prohibits discrimination by any filing utility against wholesale customers or between wholesale customers. If the Commission were correct, a utility with but a single wholesale customer could file a wholesale rate of 300% higher than a corresponding retail rate, and after suspension, a customer would have to pay that rate for, perhaps, the five years it has taken the Commission to decide one recently decided rate case.[4]

The Commission's choice of legislative history, even on its face, without regard to the fact that the testimony quoted was given in response to a somewhat different version of the bill than enacted, simply shows, as the court of appeals noted, that the general intent was to confine the Commission's actions to the wholesale rates over which it had jurisdiction, and not to give it power to increase or decrease retail rates, as to which jurisdiction was left with the State Commissions. Cf. the *Shrevesport* case, *Houston, East & West Texas Railway Co.* v. *The United States*, 234 U.S. 342 (1914). Thus, neither the statute nor the legislative history is consistent with the Commission's argument.

3. The second half of the Commission's argument relies upon an equally faulty hypothesis. Thus, the Commission argues that wholesale rates must recover allocated wholesale costs if they are to be set by the Commission. Petition, p. 9. This is nonsense on several counts. First, the Commission has, since the beginning of its exercise of its rate jurisdiction, held that where there is an allegation of discrimination "[f]or the purpose of relieving a discrimination we interpret the statute to mean that the reasonable wholesale rate for any class of customers be not higher than the lowest rate charged by vendor utility to any customer for the same class of service under the same or substantially similar conditions." *Otter Tail Power Co.* 2 FPC 134, at 149 (1940). The analysis set forth in that decision was correct then and remains correct today. See also *Gulf States*

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[4] *Municipal Light Boards of Reading & Wakefield, Massachusetts, et al.* v. *Boston Edison Company*, FPC Docket Nos. E-7400 et al. _____ FPC _____. Increased rate filed January 29, 1970, effective April 30, 1970, Opinion 729 issued May 13, 1975.

Utilities Co. 1 FPC 522(1938); *Wisconsin-Michigan Power Co.*, 31 FPC 1445(1964).

Second, the Commission has in the past expressly set jurisdictional rates under the Natural Gas Act to allow competition with non-jurisdictional gas and other fuel rates, recognizing that the jurisdictional rates may be set below what the Commission might otherwise consider to be just and reasonable. See, *e.g.*, *Florida Gas Transmission Co.*, 47 FPC 341, 366-367(1972). This Court has expressly recognized the appropriateness of considering non-jurisdictional rates in setting jurisdictional rates. *Panhandle Eastern Pipe Line Co.* v. *FPC*, 324 U.S. 635, 646-67 (1945).

Third, the Commission appears to argue or infer that somehow or another the setting of an electric wholesale rate is a simple exercise in establishing costs and adding them up to come to a "single proper rate." Petition, pp. 10-11. That assertion is remarkable for its lack of understanding of the Commission's own function and practice. For example, in the last electric rate case fully decided by the Commission, the Presiding Law Judge disposed of the issues before him in an Opinion which took 188 pages. *Municipal Light Boards of Reading and Wakefield, Massachusetts* v. *Boston Edison Company*, FPC Docket No. E-7400 *et al.*, *supra*. If the setting of rates were as simple as inferred by the Commission in its Petition, it surely would not have taken the Commission five years to determine the merits of that case.

4. Finally, a further difficulty with the Commission's view is that if it were adopted, the Commission would find itself required to provide the same protection against discrimination under Part I of the Act which the court below has correctly held it to be obligated to provide under §§205 and 206. Part I applies generally to licensees of hydro-electric projects including AP&L. Section 20 of the Act, 16 U.S.C. 813, provides:

> "That when said power or any part thereof shall enter into interstate or foreign commerce the rates charged and the service rendered by any such licensee . . . or by any person, corporation, or association purchasing power from such licensee for sale and distribution or use in public service shall be reasonable, non-discriminatory and just to the

> customer and all unreasonable discriminatory unjust rates or services are hereby prohibited and declared unlawful; and whenever any of the States directly concerned has not provided a commission or other authority to enforce the requirements of this Section within such State . . . jurisdiction is hereby conferred upon the Commission, upon complaint of any person aggrieved, upon the request of any State concerned, or upon its own initiative to enforce the provisions of this Section, to regulate and control so much of the services rendered and of the rates and charges of payment therefor as constitute interstate or foreign commerce. . . .

Section 19, 16 U.S.C. 812, further provides that, as a condition of hydro-electric license under Part I, if a state has not authorized and empowered a commission to regulate and control the services to be rendered by a licensee or the rates and charges of payments therefor, jurisdiction is conferred upon the Commission to exercise such regulation and control until such time as the State shall have provided a commission or other authority for such regulation and control. Since it is clear under *FPC* v. *Southern California Edison Co.*, 376 U.S. 205 (1964), as it was clear under the words of the statute, that no state can have jurisdiction to act against a price-squeeze by lowering a wholesale rate which discriminates against the wholesale customer, then by virtue of Sections 20 and 19, the Federal Power Commission is automatically granted the authority under Part I to eliminate the discrimination.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

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